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COLUMBIA, SOUTH CAROLINA

August 8, 2008

VIA ELECTRONIC FILING

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Public Service Commission of South Carolina
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**Re: Application of Duke Energy Carolinas' for Approval of Decision to
Incur Nuclear Generation Pre-Construction Costs
Docket No. 2007-440-E**

Dear Mr. Terreni:

Enclosed for filing please find Duke Energy Carolinas' Memorandum in
Opposition Friends of the Earth Motion to Rescind or Amend Order. By copy of this
letter we are serving copies of the same on all counsel of record.

If you have any questions, please have someone on your staff contact me.

Yours truly,

ROBINSON, MCFADDEN & MOORE, P.C.

Frank R. Ellerbe, III

FRE/tch
Enclosure
cc/enc:

Lawrence B. "Bo" Somers, Associate General Counsel (via email)
Kathryn B. Nolan, Assistant General Counsel (via email)
Nanette Edwards, Esquire (via email & U.S. Mail)
C. Lessie Hammonds, Esquire (via email & U.S. Mail)
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Robert Guild, Esquire (via email & U.S. Mail)

STATE OF SOUTH CAROLINA

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of

COVER SHEET

Application of Duke Energy Carolinas, LLC for
Approval of Decision to Incur
Nuclear Generation Pre-Construction Costs

DOCKET
NUMBER: 2007-440-E

(Please type or print)

Submitted by: Frank R. Ellerbe, III

SC Bar Number: 1866

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

- ☐ Emergency Relief demanded in petition ☐ Request for item to be placed on Commission's Agenda expeditiously
- ☐ Other: _____

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)		
<input checked="" type="checkbox"/> Electric	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Letter	<input type="checkbox"/> Request
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input checked="" type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certification
<input type="checkbox"/> Electric/Telecommunications	<input type="checkbox"/> Answer	<input type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigation
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter
<input type="checkbox"/> Gas	<input type="checkbox"/> Certificate	<input type="checkbox"/> Petition for Rulemaking	<input type="checkbox"/> Response
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discovery
<input type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition
<input type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input type="checkbox"/> Prefiled Testimony	<input type="checkbox"/> Subpoena
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/>
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest	
<input type="checkbox"/> Other:	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit	
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report	

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

DOCKET NO. 2007-440-E

In Re:)	DUKE ENERGY
)	CAROLINAS'
Application of Duke Energy Carolinas, LLC)	MEMORANDUM IN
For Approval of Decision to Incur Nuclear)	OPPOSITION TO FRIENDS
Generation Pre-Construction Costs)	OF THE EARTH MOTION TO
)	RESCIND OR AMEND
)	ORDER
)	

Duke Energy Carolinas, LLC, ("Duke Energy Carolinas" or the "Company") files this memorandum to oppose the motion filed by the Friends of The Earth ("FOE") to rescind or amend Order No. 2008-417. Order No. 2008-417 was served June 9, 2008. By its motion FOE seeks reconsideration or rehearing of that order in violation of S.C. Code §58-27-2150. The FOE motion is not authorized by statute or by the rules of this Commission. In addition, the arguments advanced by FOE in support of its motion provide no basis for the relief it seeks, as virtually identical issues were previously considered by the Commission in issuing its June 9, 2008 Order approving Duke Energy Carolina's decision to incur preconstruction costs for the Lee Nuclear Station.

A. The FOE Motion is Not Permitted Under South Carolina Law

Although FOE has cited S.C. Code §58-27-2130 as authority for its motion, the applicable provision is §58-27-2150 which governs petitions for rehearing of matters determined by the Commission. Section 58-27-2150 requires that a petition for rehearing be filed within ten days of service of the order. Order No. 2008-417 was

received by FOE on June 10 and FOE's motion was filed July 24, long after the ten day deadline had passed.

The relationship between §§58-27-2130 and 58-27-2150 is plainly stated in §58-27-2130: "[t]he Commission may at any time, except in those cases provided for in Section 58-27-2150, after notice and after opportunity to be heard as provided in the case of petitions, rescind or amend any order or decision made by it." Thus, an issue which could be raised in a petition for rehearing may not be raised under §58-27-2130.

The basis of the FOE motion is purported new "evidence," which it attempts to argue establishes uncertainty as to the United States Nuclear Regulatory Commission ("NRC") design certification for the AP1000 technology selected for the proposed Lee Nuclear Station.¹ Although FOE has attempted to present the basis for its motion as based on a change in circumstances relating to the NRC process for approval of the Westinghouse AP1000 reactor design, that is not really the argument that is being advanced. What has happened at the NRC is simply part of the process described by Duke Energy Carolinas in support of its application. In his testimony, the Company's Chief Nuclear Officer, Dhiaa Jamil, explained the NRC process to this Commission. Mr. Jamil's testimony made it plain that the NRC process had been changed and was now intended to "provide for completion of safety reviews before substantial construction is authorized." Tr. Vol. 4, p.381. He went on to point out that "[t]he combination of these changes should logically lead to a much higher level of predictability of project cost and schedule; however, this assumption has not been tested." Tr. Vol. 4, p.381 (Emphasis added). The Commission's order cited this testimony as part of the basis for its finding

¹ The FOE challenge to the AP1000 design certainty is curious in light of the actual status of the NRC process, as is discussed below in Section B.

that "...in light of the significant benefits flowing from the maintenance of the nuclear option, as well as the significant hurdles remaining for the development of that option, the assurances provided by granting the Company's Application is necessary to allow the Company to move forward with continued development of nuclear generation capability." Order No. 2008-417, pp.18-19. (Emphasis added).

The June 27, 2008 NRC letter to Westinghouse regarding Revision 16 is simply an example of the process described by Mr. Jamil and recognized by the Commission in allowing the Company to move forward to confront these significant hurdles. What FOE is really arguing in its motion is that the Commission should not have approved the application until there was more certainty in the NRC licensing process, an argument that FOE made in opposing the application and could have attempted to make again in a petition for rehearing pursuant to §58-27-2150. Since that argument is one that FOE should have made by a petition for rehearing, FOE is precluded from raising the issue under §58-27-2130. Allowing a party to use §58-27-2130 to resurrect issues for an unlimited period of time for any reason which it could have raised by petition for rehearing would undermine the certainty of the Commission's orders in a way never intended by the General Assembly. The FOE motion to amend Order No. 2008-417 is untimely, is not authorized by statute, and should be denied.

B. The June 27, 2008 NRC Letter Provides No Basis for Amending or Rescinding Order No. 2008-417.

As reflected in Order No. 2008-417, the purpose of Duke Energy Carolinas' application was to obtain the Commission's approval of its decision to incur preconstruction costs in connection with the proposed Lee Nuclear Station. As authorized by §58-33-225, this proceeding focused on whether it was reasonable for the

Company to take steps in preparation for potential construction of that facility in light of the information known at the time. The statutory provision explicitly contemplates a review of a proposed or planned facility at an early time in the planning process prior to the commencement of construction. As part of its application Duke Energy Carolinas explained the process that it would follow to keep the "nuclear option open," but also made it clear that no final decision had been made by the Company to construct the Lee Nuclear Station (Tr. Vol. 4, p.325), that "the regulatory approval process for the Lee Nuclear Station is lengthy and complex," and that the Company had just taken the "first steps" in that process. Tr. Vol. 4, p.325. In fact, the uncertainties and challenges regarding the technical and NRC regulatory approval process for the Lee Nuclear Station that the FOE mistakenly tries to assert are the basis of its motion were not only expressly acknowledged by Duke Energy Carolinas in this proceeding before the Commission (Tr. Vol. 4, p.381), but form the very basis of the Company's application to determine the prudence of its decision to incur preconstruction costs. The Commission considered this evidence, the FOE testimony, and the record as a whole in issuing its June 9, 2008 Order.

Furthermore, although the FOE's motion attempts to make purportedly "new" arguments to question the NRC design certification for the AP1000 technology, it is undisputed that the Westinghouse AP1000 design was fully certified by the NRC and entered into NRC regulations via a Federal Register notice published on January 27, 2006 (71 FR 4464). Consequently, NRC applicants intending to construct and operate an AP1000 design could do so by referencing the AP1000 design certification rule in Title 10 of the Code of Federal Regulations at Part 52, Appendix D, "Design Certification

Rule for the AP1000 Design.” Additionally, the NRC issued a revised Final Design Approval based on Revision 15 of the Westinghouse Design Control Document on March 10, 2006. As such, a company can use the currently approved AP1000 design to actually construct and operate a new reactor, even though the NRC design certification process allows for approval of design enhancements through revisions to an already certified design. Westinghouse is now utilizing this aspect of the NRC design certification process to further enhance the AP1000 design by filing Revision 16 of the design control document with the NRC on May 26, 2007. The fact that Revision 16 is pending before the NRC does not change the fact that the AP1000 has already been fully certified by the NRC as evidenced in 10 CFR Part 52.

Accordingly, the June 27, 2008 NRC letter cited by FOE is simply part of the NRC review process for an enhancement to the design certification of the Westinghouse AP1000 reactor design. Approval of revisions to certified designs is just one part of the lengthy and complex approval process which must be completed as part of the proposed Lee Nuclear Station. The fact that additional information is requested by the NRC from Westinghouse in the certification process and that a deadline may be changing in that process is no basis for amending or rescinding this Commission's approval of the decision by the Company to incur costs to keep the nuclear option open.

Importantly, the NRC reached a similar conclusion in rejecting a nearly identical argument to the one made by FOE here regarding Revision 16 in connection with the Progress Energy COLA for its proposed new reactors at the Shearon Harris Nuclear Power Plant in North Carolina. An intervenor in that proceeding, the North Carolina Waste Awareness and Reduction Network (“NCWARN”), asked the NRC to suspend

the proceeding on the Progress COL until completion of Revision 16 of the certified design for the AP1000. The NRC explicitly rejected NCWARN's request and refused to delay the COL proceeding on that basis, noting that its rules specifically contemplated that parties could proceed with licensing proceedings prior to completion of the design certification review process. See NRC Memorandum and Order in Dockets 52-022 COL and 52-023 COL, dated July 23, 2008. (Copy attached).


If the NRC sees no reason to delay a COL proceeding (which seeks approval to actually construct a new nuclear facility) to await final certification of a revision to the AP1000 design, there is certainly no reason for this Commission to reconsider its decision to approve Duke Energy Carolinas' decision to incur *preconstruction costs* to continue the development of the proposed Lee Nuclear Station and preserve the option of this greenhouse gas emission-free baseload resource for the benefit of the Company's customers. The FOE motion presents no basis for the relief it seeks and it should be denied.

Conclusion

The FOE motion to rescind or amend should be denied. It is an untimely attempt to relitigate an issue which was already considered by the Commission, and which the FOE could have attempted to raise by a petition for rehearing. In addition, the motion presents no basis for this Commission to reconsider its approval of the Company's decision to incur preconstruction costs to preserve the Lee Nuclear Station as an option for Duke Energy Carolinas' customers.

Dated this 8th day of August, 2008.

ROBINSON, MCFADDEN & MOORE, P.C.



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BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2007-440-E

In the Matter of)

Application of Duke Energy Carolinas, LLC)
for Approval of Decision to Incur Nuclear)
Generation Pre-Construction Costs For the)
Lee Nuclear Station in Cherokee County)

CERTIFICATE OF SERVICE

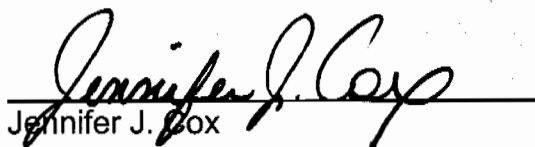
This is to certify that I, Jennifer J. Cox, legal assistant with the law firm of Robinson, McFadden & Moore, P.C., have this day caused to be served upon the person(s) named below **Duke Energy Carolinas, LLC's Memorandum in Opposition to Friends of the Earth Motion to Rescind or Amend Order** in the foregoing matter by causing a copy of same to be placed in the United States Mail, postage prepaid, in an envelope addressed as follows:

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C. Lessie Hammonds, Esquire
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Robert Guild, Esquire
Friends of the Earth
314 Pall Mall
Columbia, SC 29201

Dated at Columbia, South Carolina this 8th day of August, 2008.


Jennifer J. Cox